IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, et al.,
Petitioners,

v.

ABRAM BRYANT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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I. INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to

[1] The parties' letters of consent to the filing of this brief are being filed with the clerk pursuant to Sup. Ct. Rule 42(2).

assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, several past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

Our extensive litigation program against employment discrimination is conducted through our privately funded Government Employment Project (providing representation to federal, state, and local government employees claiming unlawful employment discrimination), through our Equal Employment Opportunity Project (which provides representation to private-sector plaintiffs), and through the general litigation activities of our Mississippi and Washington offices and other local affiliates.

In this case, the Court must review the provisions of a statewide collective bargaining agreement in the brewery industry which, under the guise of "seniority," has effectively locked out of permanent employment positions blacks and other minority workers. If the challenge mounted by the petitioners to the decision of the Ninth Circuit is successful, the seniority exception embodied in § 703(h) of the Civil Rights Act of 1964, as amended, will become an insurmountable obstacle to a substantial proportion of otherwise worthy Title VII claimants. We believe that such a result was neither intended by Congress nor envisioned by the Court in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977) (hereafter, *"Teamsters"),* on which petitioners principally rely.

We have previously addressed issues of racial discrimination in the context of higher education as well as employment in our *amicus* briefs filed in *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974), *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), and *United Steelworkers of America* v. *Weber,* 99 S.Ct. 2721 (1979). Because the issues presented by this case are vitally important to the realization of the goal of equal employment opportunity for blacks, the Committee files this brief urging affirmance of the judgment below.

II. PRELIMINARY STATEMENT

1. Prior Proceedings

This uncertified class action was begun in October, 1973, in the United States District Court for the Northern District of California, by respondent, Abram Bryant, against petitioners, the California Brewers Association; the Falstaff Brewing Corporation, an individual brewery where Bryant had worked; the Teamster Brewery and Soft Drink Workers Joint Board of California ("Joint Board") of the International Brotherhood of Teamsters, etc. ("Teamsters"); and two Teamsters local unions, seeking relief pursuant to, *inter alia,* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (sometimes referred to hereafter as "Title VII") to remedy alleged discriminatory employment practices in the brewery industry in California. Bryant alleged in his Second Amended Complaint (A. 9-24)[2] that he had worked in the brewery industry in California since 1968; had become a "temporary employee" therein; had sought unsuccessfully to become a "permanent employee," which status would have assured respondent important benefits and promotions; but had been thwarted in that endeavor by the concerted, illegal and discriminatory conduct of petitioners. (Second Amended Complaint, ¶¶ 12-22a, A. 16-18.) Respondent alleged that the acts of racial discrimination which had barred his entry into "permanent employee" status resulted inexorably from a collective bargaining agreement, dated June 1, 1970, entered into by, among others, the Teamsters Joint Board and the California Brewers Association ("Collective Bargaining Agreement"). (A. 25-42.) Specifically, Bryant pointed to § 4(a)(1) of the Collective Bargaining Agreement, which provided in 1970 (as it had for two decades past) that for a "temporary" employee to achieve "permanent" status, he had to work a minimum of 45 weeks in any year for a member brewery ("the 45 week

[2] References to the Appendix will be indicated by the letter "A" followed by relevant page citations.

requirement"). (A. 27.) Bryant alleged that, as a practical matter, the 45 week requirement had operated and would continue to operate in the brewery industry as a barrier to any worker's rise from the "temporary" to the "permanent" classification. He also alleged that virtually no black workers had achieved the status of "permanent employee." (Second Amended Complaint, § 16, A. 17.) He sought as relief (1) a declaratory and injunctive order enjoining the enforcement of the 45 week requirement; (2) a mandatory injunction awarding him unspecified retroactive status and benefits; and (3) damages.

Following procedural developments not material to this appeal, petitioners moved pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for an order dismissing the Second Amended Complaint on the ground that it failed to state a claim for which relief could be granted. That motion was granted, without opinion, and an order of dismissal entered on October 17, 1974. (A. 43-45.) The record does not reflect the grounds urged by the petitioners or the reasons underlying the decision of the District Court. It may be inferred from its summary disposition of the case, however, that the District Court reached its ultimate judgment without referring to any matters other than the Second Amended Complaint and the Collective Bargaining Agreement.

Respondent's appeal to the Court of Appeals for the Ninth Circuit thus tested solely the adequacy of the stricken pleading, not the quality or sufficiency of the evidence that respondent might marshall at a trial. It is necessary to stress this elementary procedural observation inasmuch as petitioners' argument to this Court occasionally reads as if respondent had been given an opportunity below to develop the record fully. (Brewers Br. at 6-12, 20-22.)[3] Following initial oral argument

[3] References to to the Brief of Petitioners California Brewers Association and California Breweries will be indicated by "Brewers Br." followed by relevant page citations. References to the joint brief by the unions and to the *amicus* brief submitted by the Equal Employment Advisory Council will be indicated by "Union Br." and "EEAC Br.," respectively, followed by the relevant page citations.

before the Court of Appeals, *Teamsters* was decided, the proper interpretation of which has become the centerpiece of this case. *Teamsters* clarified the scope of the defense to Title VII suits found in § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). That section provides:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Interpreting this provision, the Court held, 431 U.S. at 353-54, that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."

The Court of Appeals below, in an opinion reported at 585 F.2d 421 (1979), reversed the dismissal of the Second Amended Complaint, concluding that respondent had pleaded facts sufficient to entitle him to a trial of his employment discrimination claims. In so concluding, the Ninth Circuit rejected petitioners' defense—reshaped in light of *Teamsters*—that the 45 week requirement was part of a *bona fide* seniority system immunized from review by § 703(h). That conclusion was mandated by its analysis of the terms and provisions of the Collective Bargaining Agreement.[4] The Court

[4] Notwithstanding the petitioners' contention that the Ninth Circuit engaged in impermissible appellate fact finding (Brewer's Br. at 42-45), the Court of Appeals did no more than summarize the allegations and uncontroverted documentary evidence before it. Indeed, where the District Court does not weigh the credibility or demeanor of live witnesses, the Court of Appeals is in as good a position as the District Court to summarize and evaluate the evidence. 5A Moore's *Federal Practice*, ¶ 52.04 at 2677 (2d ed. 1979), and cases collected therein. Moreover, the Ninth Circuit remanded to the District Court the task of determining the operative effect of the Collective Bargaining Agreement. 585 F.2d at 428.

of Appeals reasoned, first, that the 45 week requirement did not "involve an increase in employment rights or benefits based upon length of the employee's *accumulated* service." (emphasis added) 585 F.2d at 426. Second, it construed the provision as an "all-or-nothing proposition." 585 F.2d at 427. Third, the Court noted that credit for time worked was not cumulative from year to year. Because the 45 week requirement operated in this fashion, it could not lawfully be characterized as a seniority requirement or as part of a seniority system. Having concluded that the challenged provision of the Collective Bargaining Agreement was thus not free from judicial scrutiny by reason of § 703(h), the Court of Appeals remanded the cause "to give plaintiff the opportunity to prove that the 45-week provision had a discriminatory impact on Black workers in violation of Title VII, ..." 585 F.2d at 428.

The petition for certiorari was granted on June 4, 1979. 47 U.S.L.W. 3781, 62 L. Ed. 2d 282.

2. Statement of Facts

The facts comprise the well-pleaded allegations of respondent's Second Amended Complaint, read in conjunction with the Collective Bargaining Agreement. As properly found by the Ninth Circuit, the following are the relevant factual allegations:

> In 1968 plaintiff Abram Bryant, a Black person and a member of Teamsters' Local 856, got his first brewery worker's job with Falstaff Brewing Company in Northern California. Bryant earned his living working for Falstaff until 1973 when he went to work for Theodore Hamm Company. In 1974 when this action was filed, despite 6 years of brewery experience, Bryant was still classified as a temporary employee because of his inability to satisfy the 45-week provision in the collective bargaining agreement between all major California breweries and brewery unions. Under this provision, found in section 4 of the

> agreement, a temporary employee must work 45 weeks in one calendar year before he is classified as permanent and entitled to additional fringe benefits and greater job security. On its face the requirement appears innocuous. The rub is that changed circumstances in the brewery industry, including greater automation, improved brewing methods, and consolidation of breweries, have lessened the demand for labor, so that now it is virtually impossible for any temporary employee, Black or White, to work 45 weeks in one calendar year. [Footnotes omitted.] 585 F.2d at 423-424.

The specific provisions of the Collective Bargaining Agreement that precluded Bryant and others similarly situated from entering the ranks of "permanent employees," while simultaneously insulating those white workers who had achieved the highest employment status in the brewery industry from being divested of their status, are contained in §§ 4(a)(1) and 4(a)(5) thereof. Section 4(a)(1) provides in pertinent part that a temporary employee becomes a permanent employee when he "has completed forty-five weeks of employment under this Agreement in one classification in one calendar year as an employee of the brewing industry in [California]." Section 4(a)(5) provides that a permanent employee shall lose his status as such where, subject to exceptions not here relevant, he "is not employed under this Agreement for any *consecutive period* of two (2) years . . . ." (emphasis supplied) (A. 29.) It is not disputed that the latter provision means that divestiture of permanent employee status under Section 4(a)(5) occurs only where an employee fails to work at all in the brewery industry for a two-year period.

The balance of the Collective Bargaining Agreement, discussed at length by petitioners, addresses other distinct rights, benefits and obligations of the employees covered thereunder. (Brewers Br. at 8-12.) It is respectfully suggested that these provisions, which pertain to dispatching and job referrals, layoffs and bumping rights, reflect traditional notions

of seniority, in that rights accrue gradually and proportionately with the passage of time. These "true seniority" provisions, as the Ninth Circuit developed that concept, 585 F.2d at 426-427, are functionally distinct and severable from the status-defining provisions of §§ 4(a)(1) and 4(a)(5) described above.

In sum, focusing solely on the challenged provisions of the Collective Bargaining Agreement and the practices of the petitioners thereunder, respondent alleged that he and other black employees have been "forever precluded from achieving permanent status." (¶*16, Second Amended Complaint, A. 17.)

Although petitioners maintain that the Court of Appeals attached undue weight to Bryant's allegations (Brewers Br. at 43-46), the foregoing summary of the facts must be assumed to be accurate and complete for purposes of this appeal.[5] Bryant's complaint thus alleged serious and pervasive patterns of racially discriminatory practices in a state-wide industry.[6] This appeal

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[5] Indeed, the only additional fact that should be considered by the Court is the concession by petitioners that numerous member breweries in the California Brewers Association are now closed or are operating under agreements different from the Collective Bargaining Agreement under review here. (Brewers Br. at 6-7, n.7.) Since equitable relief against such defendants may be impossible to effectuate, the altered relationship of the parties may render this case moot. *Hernandez* v. *European Auto Collision, Inc.*, 487 F. 2d 378, 387 (2d Cir. 1973), (in Civil Rights Act case where claim for specific relief became moot, remaining claim for nominal damages will not preserve suit); and *De Funis* v. *Odegaard*, 416 U.S. 312 (1974) (where injunction is no longer necessary to protect plaintiff's claimed entitlement to attendance at law school, case dismissed as moot).

[6] The standard which governs the dismissal of a complaint under Rule 12(b)(6) is that "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim" (emphasis omitted). 2A Moore's *Federal Practice* ¶ 12.08 at 2271, 2274 (2d ed. 1979). In the context of a civil rights case, the Court has similarly held that "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974).

ultimately will determine whether he shall have an opportunity to prove his case in court; if not, respondent will have been thwarted by petitioners' conclusory assertion that the challenged provisions of the Collective Bargaining Agreement are free from judicial scrutiny because they may loosely be characterized as part of a seniority system established prior to the passage of the Civil Rights Act of 1964.

3. Summary of Argument

To determine whether Bryant is entitled to a hearing in the District Court of his claim that the 45 week requirement violates Title VII, the Court will have to determine the scope of the seniority exemption carved out of the Civil Rights Act by § 703(h). A number of decisions by this Court establish that in order to make out a *prima facie* case under Title VII, a plaintiff who challenges a facially neutral provision in an employment agreement that was adopted without impermissible racial motivation must show that the provision has had markedly disparate effects on white and nonwhite employees and cannot be justified by business necessity.

Teamsters decided that § 703(h) exempts from review employment practices to the extent that they are components of *bona fide* seniority systems established prior to the enactment of the Civil Rights Act of 1964, notwithstanding that they may perpetuate pre-Act unequal treatment of whites and nonwhites. Although the Court in *Teamsters* carefully circumscribed the requirement that a challenged practice be *bona fide,* it did not directly address the question of what constitutes a seniority system. Petitioners argue, in essence, that provisions of labor agreements pertaining to hiring, promotion, bumping and firing are part of a seamless web permeated by the concept of seniority. Accordingly, they urge that courts should not attempt to dissect such agreements in an effort to eliminate perceived discriminatory provisions, since any such judicial effort will necessarily upset a carefully negotiated system of rights and obligations agreed to over years by management and

labor. However, despite these predictions of dire consequences, federal courts in the wake of *Teamsters* have succeeded in isolating and enjoining parts of collective bargaining agreements that are violative of Title VII. Hence, it would appear that the task of analyzing such agreements and framing appropriate equitable decrees that remedy civil rights violations but respect and preserve other racially-neutral provisions is not beyond the capacity of the federal courts.

Moreover, a careful analysis of the case law shows that it is possible to extract certain core concepts that give meaning to the statutory term "seniority." The emphasis placed by the Ninth Circuit in its decision below on graduated increases in employment rights or benefits based upon the length of an employee's accumulated service was fully warranted. The court's construction is the more compelling when it is recognized that seniority is an *exception* to a statute whose overriding purpose is the extension, to all covered workers, of equal employment opportunities. A strict interpretation of "seniority" in § 703(h) thus comports with the basic scheme of Title VII.

Measured against these standards, the 45 week requirement cannot escape judicial scrutiny. Its principal characteristics are those alleged by Bryant and identified by the Ninth Circuit: (i) forfeiture of time accrued after each calendar year; (ii) the impossibility of satisfying the criterion; and (iii) the failure of the Collective Bargaining Agreement to confer any intermediate right or benefit short of permanent status on a temporary employee who works a substantial number of weeks — but fewer than 45. In view of these deficiencies, the Court of Appeals properly reinstated the Second Amended Complaint so as to permit Bryant to attempt to prove his allegations of discriminatory practices in the brewery industry in California.

III. ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S ALLEGATIONS OF EMPLOYMENT DISCRIMINATION FLOWING FROM THE 45 WEEK REQUIREMENT WERE NOT SUBJECT TO DISMISSAL BY THE MERE ASSERTION OF THE "SENIORITY" DEFENSE UNDER SECTION 703(h).

1. Nature and Reach of Title VII Suits

The primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800 (1973). In order to accomplish this goal, Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Company,* 401 U.S. 424, 431 (1971). Numerous decisions in this Court have demonstrated that a *prima facie* Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group. *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 137 (1976); *McDonnell Douglas Corp.* v. *Green, supra,* at 802 n.14; *Griggs, supra,* at 430. Thus, a facially neutral practice which perpetuates the effects of prior discrimination generally violates Title VII.

As the Court held in *Griggs:* "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. In *Griggs* the Court held that an employer's practice of requiring either a high school diploma or passing an intelligence test as a prerequisite to employment or transfer violated the Civil Rights Act of 1964. Neither requirement was shown to bear a "demonstrable relationship to successful performance of the jobs." 401 U.S. at 431. The Court

explained the overriding purpose of Title VII of the Civil Rights Act in these terms:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. 401 U.S. at 429-30.

Contrary to the central contention articulated by petitioners, who would read Title VII as part of a "Seniority Exemption Act of 1964," *Teamsters* carved out a narrow exception within the rule announced in *Griggs.* To accept the boundless definition of "seniority system" proferred by petitioners (Brewers Br. at 25-35, Union Br. at 21-32) would vitiate Title VII by requiring virtually every employment discrimination claimant to prove initially that the practice complained of was not remotely related to a seniority system. The limited immunity granted by § 703(h) should not be allowed to protect any and all elements of labor agreements which employers and unions characterize as components of seniority systems. (EEAC Br. at 30.) To do so would permit management and unions to dilute employees' civil rights by the simple expedient of labelling as a "seniority" requirement any challenged provision of a collective bargaining agreement. Such a result would encourage evasion of the Act's requirements and obstruct the important goals of Title VII. Nothing in *Teamsters* requires this result, as a close examination of its facts and rationale will demonstrate.

2. Scope of Seniority Exemption Under § 703(h)

In *Teamsters,* black employees of a carrier company challenged certain seniority provisions in their union's collective bargaining agreements. The employees' union maintained two separate bargaining units which corresponded to the company's two departments — line drivers and city drivers. For purposes

of calculating "competitive seniority," *i.e.*, "the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff...," 431 U.S. at 343, seniority was based upon length of service in a particular *department*. For purposes of calculating "benefit seniority," *e.g.*, vacation time and pension credits, seniority was based upon length of service with the *company*. Employees seeking to transfer from one department into the other could not retain their accumulated "competitive seniority."

Black workers had traditionally been assigned only to the less desirable city driver department and claimed that the forfeiture of competitive seniority upon transfer unfairly discriminated against them and "locked" them into jobs. The Court held that the seniority system was protected by § 703(h), since "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54.

The seniority system in *Teamsters* granted job seniority along historically separate job classifications in a manner which perpetuated the allocation of those jobs on racial lines. However, it did not bar employees' access to a different job, nor any non-employees' access to a particular job. In *Teamsters,* black workers could become line drivers after the Act was passed; in large measure they declined to seek such a transfer because to do so would have jeopardized their job security. The gist of *Teamsters* is that a *bona fide* seniority provision in a fairly negotiated collective bargaining agreement is not prohibited under Title VII of the Civil Rights Act of 1964, as amended, simply because it may not confer on present employees seeking transfer to a new department any greater rights than are enjoyed by non-employees.

In sum, *Teamsters* gave content to the requirement in § 703(h) that a seniority system, to be free from challenge in Title VII actions, must be *bona fide*. But *Teamsters* left to another day the question of the precise contours of seniority

systems as such. Thus, contrary to the contention of petitioners, Bryant's argument that he is entitled to an order striking down certain portions of the Collective Bargaining Agreement that are not part of the core seniority system in the California brewery industry is not foreclosed by *Teamsters.*

Results reached by post-*Teamsters* cases refute petitioners' proposition that § 703(h) protects all aspects of the employer-employee relationship that may be attributable to alleged seniority systems. The Court has recognized in a sex discrimination case that also arose under § 703(a)(2) the inherent limitations of § 703(h). In *Nashville Gas Co.* v. *Satty,* 434 U.S. 136 (1977), the Court held that certain elements of a seniority system having a discriminatory impact upon women violated § 703(a)(2) of Title VII. The employer in *Satty* required pregnant female employees to take a leave of indeterminate length. The seniority system provided that such employees must forfeit any job security accrued prior to the leave. Thus, an employee who sought re-employment after a pregnancy leave could only obtain a position "for which no individual currently employed is bidding . . . " 434 U.S. at 139.

When the employee in *Satty* applied for reinstatement, she learned that her previous position had been eliminated due to *bona fide* cutbacks in her department. Instead, she received a job in a temporary capacity. Her repeated attempts to secure a permanent position were rejected in favor of other employees who had begun to work during her pregnancy leave. The Court stated that "both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of § 703(a)(2)." 434 U.S. at 141. The employment practice which denied accumulated seniority to female employees was found to be facially neutral but could not be sustained due to its discriminatory effect upon women's employment opportunities. *Id.* at 143. The Court thus gave tacit recognition to the fact that particular sections of collective bargaining agreements may be nullified on Title VII grounds notwithstanding their loose relationship to core seniority provisions of such agreements.

Post-*Teamsters* cases in the lower federal courts demonstrate that *Teamsters* does not authorize unwarranted expansion of the scope of the term "seniority system." Employers have not been permitted to dilute employees' civil rights by incorporating extrinsic practices into the definition of "seniority" systems.

In *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, *on rehearing*, 583 F.2d 132 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3761 (May 21, 1979), for example, the court held that a restrictive provision governing interdepartmental transfer opportunities was not part of the seniority system. An employee seeking to transfer to a new department could bid for an entry level job only in that department. Upon transferring he was required to retain the entry level job for a minimum of ten days before becoming eligible to bid for vacancies in the new department. In striking down this system, which inhibited interdepartmental transfers, the court stated:

> While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized by § 703(h) and *Teamsters*. 583 F.2d at 133.

The *Parson* decision illustrates the need to draw careful distinctions between various aspects of employment. Although rules of promotion and tenure may have some of the attributes of seniority, that fact alone does not remove a system of promotion and tenure from judicial scrutiny.

In *Patterson* v. *American Tobacco Co.*, 586 F.2d 300 (4th Cir. 1978), the court held that a "promotional system" with a racially discriminatory impact was not part of a seniority system and consequently not immunized by § 703(h). The "promotional scheme" provided that certain jobs be filled according to

lines of progression, with employees moving from one job to the next within the line. The available jobs were predominantly in one department from which blacks had traditionally been excluded. Thus, blacks held few jobs in these lines and could not advance up the scale of progression despite their seniority. The Court of Appeals held that the lines of progression were not components of the seniority system:

> As construed by the Court in *Teamsters*, § 703(h) carves out an exception to the holding of *Griggs* that an otherwise neutral practice which perpetuates the effects of past employment discrimination is violative of Title VII. As we read *Teamsters*, this is a *narrow exception*, concerning only practices directly linked to 'a bona fide seniority system.' Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system. Consequently, *Teamsters* requires no modification of the relief we approved with regard to job descriptions, lines of progression, back pay (except such awards as may have been founded upon American's *seniority* system) or supervisory appointments. Only our decision to allow black employees to make interbranch transfers with the retention of company *seniority* impinges upon American's seniority system. (Emphasis added.) 586 F.2d at 303.

See also, Pettway v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1193-4 (5th Cir. 1978), *cert. denied*, 99 S.Ct 1020 (1979), which held that a line of progression did not constitute part of a seniority system.

3. Considerations of Statutory Interpretation

It is a well-established principle of statutory construction that "remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin* v. *Knight*, 389 U.S. 332,

336 (1967).[7] Petitioners' interpretation of the statutory exception set forth in § 703(h) effectively undermines the remedial purposes of Title VII.

Moreover, statutory exceptions to remedial laws should be read narrowly.[8] Thus, in *Phillips Company* v. *Walling,* 324 U.S. 490 (1945), the Court read restrictively a statutory exemption contained in § 13(a)(2) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(2). The Court stated that:

> The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work' . . . . Any exemption from such humantarian and remedial legislation must therefore be narrowly construed . . . . To extend an exemption to other than those plainly and ummistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people. 324 U.S. at 493.

In construing the term "seniority," petitioners rely heavily upon a line of cases decided under the Veterans Reemployment Rights Act of 1940, as amended, 50 U.S.C. App. § 459 ("Veterans Act").[9] The Veterans Act provides that a veteran who seeks re-employment after discharge from military service "shall be permitted to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes." 50 U.S.C. App. § 459(g)(4). The broad language employed in these decisions should not be taken out of context.

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[7] *See also, Powell* v. *U.S. Cartridge Company,* 339 U.S 497, 516-17 (1950); *Equal Employment Opportunity Commission* v. *Louisville & Nashville Railroad Company,* 505 F.2d 610, 616 (5th Cir. 1974), *cert. denied,* 423 U.S. 824 (1975).

[8] *Brennan* v. *Keyser,* 507 F.2d 472, 477 (9th Cir. 1974), *cert. denied,* 420 U.S. 1004 (1975); *National Automatic Laundry and Cleaning Council* v. *Shultz, 443 F.2d 689, 706 (D.C.Cir. 1971).*

[9] *E.g., Aeronautical Industrial District Lodge 727* v. *Campbell, 337 U.S. 521 (1949); Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953). *See,* Brewers Br. at 28-32; Union Br. at 23-27.

The Veterans Act was, in essence, a civil rights act for returning veterans. The purpose of the Veterans Act was to assure that individuals who engaged in military service would not be penalized upon their return to civilian life. Because the courts sought to protect the rights of returning veterans they construed terms and conditions of employment, including "seniority," broadly so as to effectuate the statutory objective. But it must be borne in mind that in the Veterans Act suits, the rights of the returning serviceman — including rights to "superseniority" — were grounded in a Congressional declaration of policy to accord enlarged benefits to veterans. Those who opposed the veterans' claims generally defended on contractual, not statutory grounds. Their arguably cramped construction of "seniority" provisions in labor-management agreements generally yielded to the specific statutory purpose of protecting returning servicemen from loss of rights occasioned by their departure from the civilian job force. Moreover, the cases relied on by petitioners simply do not arise in contexts where claims of seniority had to be weighed against competing civil rights claims of black workers protected by Title VII.

An analysis of one representative case, *Alabama Power Co.* v. *Davis,* 431 U.S. 581 (1977), illustrates the rationale behind this group of cases. Davis' employment at Alabama Power Company, interrupted by 30 months of military service, continued until his retirement. He claimed that § 9 of the Veterans Act, 50 U.S.C. App. § 459(b), required his employer to give him pension credit for his period of military service. § 9 provides in part that a veteran seeking re-employment shall "be restored...to a position of like seniority, status, and pay...." 50 U.S.C. App. § 459(b)(B)(i).

The Court focused on the nature of the benefits involved and concluded, contrary to the Power Company's assertion, that pension payments were part of the seniority system. The company could not avoid granting veterans the protection afforded by the Act by characterizing pension payments as deferred compensation for actual service rendered. The Court

held, citing *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), that "no practice of employers...can cut down the service adjustment benefits which Congress has secured the veteran under the Act." Thus, defining seniority rights in a liberal fashion best implemented the purpose of the Veterans Act.

The instant case, however, arises under the Civil Rights Act, not the Veterans Act. Although both Acts are remedial, the purpose and scope of each is fundamentally different. We do not understand petitioners to suggest that the drafters of § 703(h) of the Civil Rights Act looked to the treatment of seniority under the Veterans Act to give meaning to the statutory phrase *"bona fide* seniority...system." Nor does our research disclose any nexus between the two acts. Accordingly, cases decided under the Veterans Act ultimately offer little guidance in determining the scope of the seniority exemption under Title VII.

4. The 45 Week Requirement

As *amicus,* we are of course cognizant of the sanctity of collective barginning agreements. No one denies that freedom of collective bargaining must be respected; but proper observance of that principle should not foreclose examination of particular provisions in labor-management agreements said to relate to seniority systems.

Section 4(a)(1) of the Collective Bargaining Agreement defines a "permanent employee" as one who "has completed forty-five weeks of employment under this agreement . . . in one calendar year." (A. 27.) The Court of Appeals correctly determined that this provision neither comprises a seniority system nor is it part of a seniority system.[10] 585 F.2d at 426.

[10] In further support of their contention that the 45 week requirement *is* a seniority rule or an element of a seniority system, petitioners point to respondent's "admissions" below to that effect. (Brewers Br. at 41 n.18.) Although Bryant undeniably alleged that the contested provision was part and parcel of petitioners' seniority

[footnote continued on following page]

The sole function of the 45 week requirement is to enable the companies and the union to classify brewery workers as permanent or temporary employees. Since temporary employees are distinguishable from permanent employees only by virtue of their failure to have satisfied the 45 week minimum within one year, it is clear that the distinction between the two classes of employees is arbitrary and, unlike *Teamsters,* unrelated to a *bona fide* seniority system. The capricious aspects of the distinction are easily illustrated.

Seniority systems are intended to encourage attendance, diligence and attention to daily responsibilities because every day an employee works, he acquires greater job security and competitive advantage. Unless the 45 week requirement is satisfied, notwithstanding longevity of service in any other respect, employees are denied crucial benefits, such as job security and bumping rights. As further evidence of the proposition that the 45 week requirement is not an aspect of seniority, we invite the Court to compare the *divesting* provisions of § 4(a)(5) of the Collective Bargaining Agreement with the *vesting* provision, § 4(a)(1), described immediately above. Section 4(a)(5) provides that permanent employees can lose their protected status only if they fail to work at all for two consecutive years. (A. 29.) Section 4(a)(5) does not require a minimum amount of work within these two years. Thus, the 45 week requirement is unrelated to the proper goals of a seniority system.

[footnote continued from prior page]

system (see, *e.g.*, ¶ *15, Second Amended Complaint, A. 16-17), this characterization is hardly an admission for purposes of a motion to dismiss a complaint at the pleadings stage. "[T]he court will not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what has happened, or if these allegations are contradicted by the description itself." 5 Wright & Miller, *Federal Practice and Procedure: Civil:* § 1357 at 597 (1969). Moreover, it can hardly be doubted that the issue of whether the 45 week requirement may properly be described as a seniority provision is a mixed question of fact and law, if indeed in the post-*Teamsters* era it is not a pure question of law. (Brewers Br. at 41.)

Petitioners concede (Brewers Br. at 28) the "general truth" of the statement by the Court of Appeals that "the fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases" 585 F.2d at 426. However, petitioners attempt to retract that important concession by complaining that "the Ninth Circuit omitted any discussion of the important limitations and conditions that serve to define and qualify the operation of seniority." *Id.* The reason why the Court of Appeals did not discuss any special factors which could be included within a seniority system is that not one of these factors is present in the Collective Bargaining Agreement. Petitioners cite "superseniority" provisions and probationary requirements in other labor agreements as factors which frequently affect seniority based purely on length of service. (Brewers Br. at 26-28.) However, "superseniority" is irrelevant because it does not come into play in the brewery industry's Collective Bargaining Agreement. Also, the rules governing probation, to which petitioners refer, similarly have no bearing on the 45 week requirement. "Probationary employees are normally hired in the expectation that they will be retained as regular employees if their work proves satisfactory."[11] Satisfactory work in the brewery industry, however, does not correlate to advancement in status from temporary to permanent employee.

Moreover, the 45 week requirement cannot be justified on the basis of skill or special training or merit. Petitioners' discussion of the complexity of certain seniority systems obfuscates the fact that the 45 week requirement has no relation to either seniority or any other "important factor." For example, in *Cotton* v. *Hinton,* 559 F.2d 1326 (5th Cir. 1977), a case cited by petitioners (Union Br. at 36 n.37), the Fifth Circuit per-

[11] Bureau of Labor Statistics, United States Department of Labor, "Collective Bargaining Provisions: Administration of Seniority," Bulletin No. 1425-14 at 11 n.9 (1972)

mitted certain critical jobs to be excepted from the plant-wide seniority system only because these jobs "necessitated special treatment in light of the higher responsibility required for the performance of such jobs." 559 F.2d at 1333. Such functional distinctions are not present in the brewery industry.

As noted above, the requirement that an employee work 45 weeks during one year in order to attain permanent status bears no relationship to the fundamental ingredient of all seniority systems—total length of service. "The variations and combinations of seniority principles are very great, *but in all cases the basic measure is length of service* . . . ."[12] (emphasis added).

The 45 week requirement is not designed to reward employees on the basis of their cumulative employment record. Although temporary employees may gain in relative seniority within that category on the basis of length of service, such advancement will not lead to a change of status from temporary to permanent employee. Bryant alleged, and at this stage of the litigation it must be assumed to be true, that even the highest ranking temporary employee may be barred forever from attaining the security and benefits enjoyed by permanent employees. Assuming *arguendo* that the barrier is not impermeable, it would theoretically be possible for a low-ranking temporary employee to achieve permanent status by the quirk of working for 45 weeks in any single year, regardless of how little he may have worked in earlier years.

Although petitioners argue strenuously that the Court of Appeals slighted the seniority features of the Collective Bargaining Agreement, it should be clear from the foregoing analysis that such seniority features are distinct from and of no

[12] Cooper & Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harv. L.R. 1598, 1602 (1969); *See also,* Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv. L. Rev. 1532, 1534 (1962).

benefit to the temporary employee seeking genuine job security within the ranks of permanent employees. This anomaly serves to underscore Bryant's contention that the 45 week requirement is so far removed from true seniority, as the term is commonly understood, that judicial inquiry into its allegedly discriminatory effects is entirely proper. In contrast to the situation in *Teamsters,* where the problem arose from a loss of job security upon transfer, here there is no realistic chance of obtaining a transfer with access to job security itself. In the brewery industry, unlike *Teamsters,* there is no functional difference between permanent and temporary employees. It is thus evident that the 45 week requirement cannot be considered rationally related to any element traditionally associated with seniority system. What is more, petitioners fail to show why an equitable decree could not be framed that would nullify §§ 4(a)(1) and 4(a)(5) of the Collective Bargaining Agreement while leaving intact the *bona fide* core seniority provisions that are not the subject of Bryant's challenge.

Even the cases on which petitioners principally rely (Brewers Br. at 29-31; Union Br. at 38-9, 47-50) acknowledge the central role of true seniority. In *Teamsters,* seniority was measured from the date an employee joined the company and from the time he entered a particular bargaining unit. This dual system of seniority established different orders of priority among employees for different purposes. However, within each area, seniority accrued with length of service. Plaintiffs there did not attack the measure used, which was based on length of service; instead, the challenge was to their inability to transfer seniority between bargaining units.

This Court made clear in *Teamsters* that Title VII does not require wholesale emasculation of seniority systems so as to erase all indicia of pre-Civil Rights Act discrimination. But the statutory objective of equal employment opportunity cannot be circumvented by labelling as an element of "seniority" a discriminatory practice that disadvantages those intended to be

protected by Title VII. Bryant does not seek advancement on the basis of discriminatory practices antedating his employment in 1968 in the brewery industry. He asks only that this Court permit him to prove at trial that the 45 week requirement bears only the most attenuated relationship to commonly understood standards of seniority and should be invalidated because of its racially discriminatory effects during the period of his employment, unjustified by any business necessity. If the decision below is affirmed, respondent will endeavor to show that the 45 week requirement falls within the category of "capricious or arbitrary factors" condemned by this Court in *Humphrey* v. *Moore,* 375 U.S. 335, 350 (1964).

IV. CONCLUSION

As the foregoing analysis demonstrates, Title VII suits cannot be defeated by the bare assertion that the challenged employment practice is in some attenuated fashion related to a seniority system. Section 703(h) of the Civil Rights Act of 1964, as construed in *Teamsters,* should exempt from judicial review only those employment practices grounded in pre-1965 provisions of collective bargaining agreements that are unambiguously part of *bona fide* seniority systems. For Title VII purposes, a true seniority provision is one that entails graduated increases in employment rights or benefits based upon the length of an employee's accumulated service. Because (1) the 45 week requirement in the California brewery industry is not a true seniority provision and (2) petitioners have not conclusively shown that enjoining the enforcement of the 45 week requirement will vitiate other provisions of the subject Collective Bargaining Agreement that are exempt from review, the Court of Appeals correctly concluded that Bryant should be given a hearing in which to prove the racially discriminatory effects of the 45 week requirement. Accordingly, the judgment

of the Court of Appeals, reversing the dismissal of Bryant's Second Amended Complaint, should be affirmed.

Respectfully submitted,

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